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IN THE

Supreme Court of the United States

October Term, 1967

No. 991

In the Matter of the Estate of
MARCELLUS LINDSEY JOSLYN, also known as MARCELLUS L. JOSLYN, and as M. L. JOSLYN,

Deceased.

MARCELLUS N. JOSLYN,

Petitioner,

vs.

SUPREME COURT OF CALIFORNIA,

Respondent.

SUPREME COURT OF CALIFORNIA, MERRITT L. JOSLYN, MARY C. PARKER CURRIVAN, RONALD MERRITT JOSLYN, JOY LOUISE MacNULTY, JOYLON DAVID JOSLYN, THEODORE NEWELL JOSLYN, CELIA ALICE PARKER, M. WESLEY PARKER, III, MARCELLUS JOSLYN PARKER, ALICE JOSLYN, WILLIAM DWIGHT JOSLYN, PENNY IRENE JOSLYN, MARCELLUS LeFEVRE JOSLYN, MARINA ELAINE JOSLYN, LOIS E. MENDENHALL, MRS. MARY R. SHOFF CAREY, ROBERT F. DOLAN, BALDO M. KRISTOVICH, Public Administrator, ILSE AUDREY POLERI, MARCIA HARRIET JOSLYN SILL, MARY ALICE GURLEY, and ROBERT D. MacDONALD, individually and as Executor of the Last Will of MARCELLUS L. JOSLYN, Deceased,

Real Parties in Interest.

BALDO M. KRISTOVICH, Public Administrator, ILSE AUDREY POLERI, MARCIA HARRIET JOSLYN SILL, MARY ALICE GURLEY,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent misunderstands and misconceives our petition for a writ of prohibition, mandate or any other appropriate writ in the Supreme Court of California in this matter. It resulted from a decision by Mr. Justice Peters in *Lund v. Superior Court,* 61 Cal. 698, which provides for an extraordinary writ in the case of trial courts' acts in excess of jurisdiction in discovery proceedings, such as attempted here, resulting in dismissal arbitrarily of the $115,000,000 post probate amended will contest of petitioner.

We petitioned the court for a writ of mandate and prohibition and any other appropriate writ (certiorari) because the court below, in dismissing the appeal from the statutory right of a will contest, acted without legal authority and therefore in excess of its jurisdiction. The court, in dismissing the will contest pursuant to Section 2034 of the Code of Civil Procedure of the State of California, challenged as unconstitutional under the Fourteenth Amendment to the Constitution of the United States inherently and as construed and applied in this case, allowed other persons pro confesso to take the property of this petitioner arbitrarily and capriciously. This, we contend, is in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

As early as *Boyd v. U.S.,* 116 U.S. 616, and again repeated in *Hovey v. Elliott,* 167 U.S. 409, this Court has held that procedure such as indulged in by the California Superior Court and implicitly affirmed by

the Supreme Court of California, violated due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Our petition for the extraordinary writ in the Supreme Court of California was denied on October 11, 1967. Within the time allowed by law in this Court and within 90 days thereafter, we petitioned this Court for a writ of certiorari.

The attempt by respondent to move the proceedings back to earlier ones becomes irrelevant. Our petition for writ of certiorari is directed to the denial by the California Supreme Court of a writ of prohibition or mandate or certiorari.

Counsel for respondents has duplicated his incorrect statement of facts in this petition which is contained in his response to No. 990, directed to the Court of Appeal, Second Appellate District, State of California.

The two proceedings involve the same subject matter, namely, the petition by our client to be accorded a full and fair trial on the merits of his post probate amended will contest before a jury (Prob. Code 371, 382) of the $15,000,000 estate of his father and the appointment of the attorney through his father's will as testamentary trustee of his mother's will. Our petition is based on the fact that Section 2034 of the Code of Civil Procedure, inherently and as construed and applied in this case, is in violation of the due process clause of the Fourteenth Amendment. As we

pointed out in No. 990, the petitioner is not receiving income under his father's will. All that was left him is some bric-a-brac and old furniture of little value. Whatever has flown from his mother's estate, a woman who died more than twelve years before his father, is not in issue here at all nor relevant to the determination if his rights under his father's will except as it relates to the appointment of the same attorney who drew the will to be named as successor trustee under the power of appointment contained in his father's will which is now under attack, in which we hope and expect to have this Court order a trial and hearing on the merits.

The issue is quite simple. The courts below denied petitioner a trial on the merits of a post probate amended will contest which the statutes of California authorize and allow and which he duly and regularly pleaded and filed after being advised by a highly competent probate attorney, (Harry C. Mabry, Esq.). Respondent does not deny that the attorney who acted as attorney, business associate and tax advisor of decedent wrote the will under attack for the 89 year old ill party, with substantial financial benefits to himself which, under California law and on the mere presentation of these facts makes the will prima facie the result of undue influence and without consideration.

Magee v. State Bar, 58 Cal. (2) 423;
Estate of Rohde, 158 Cal. App. (2) 19.

In addition to that, it appears that the date on which the will was presumably executed and witnessed is faulty upon a mere observation of the document itself. Thus, the contestant would have ample grounds to set aside the will without any further testimony.

It is significant also that the California law requires trial by jury on a will contest. (Probate Code Sec. 371, 382) None was had here. The proceeding now used excluded petitioner from the amended contest of the will.

The alleged findings of fact and conclusions of law drawn with reference to the amended will contest were not based upon any testimony or evidence in open trial before the court. Nothing was subject to cross-examination before a judge or jury and no witnesses testified under oath. There was a summary dismissal of the whole proceeding. The findings of fact, conclusions of law and order dismissing the amended will contest after probate were therefore a sham and arbitrary and capricious. Not a single word of sworn testimony in open court and from the witness stand formed the basis of this arbitrary and capricous proceeding.

The only permission to use declarations and affidavits in the Probate Court of California relate to uncontested matters and proof of death.

California Probate Code, Secs. 329 and 1170;
Estate of Fraysher, 47 Cal. 2d 131, 135.

The court, therefore, proceeded to judgment without hearing any competent evidence and this Court should grant certiorari. We adopt the cases and argument on these points that are set forth in our reply in case No. 990.

We therefore pray that this Court grant the writ of certiorari and reverse the judgment and orders below.

Respectfully,

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